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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

ASGROW SEED COMPANY,
Petitioner,

v.

DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEES,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

The Plant Variety Protection Act, 7 U.S.C. §§ 2321-2581, provides legal protection for novel varieties of sexually reproduced plants. 7 U.S.C. § 2541 specifies the acts of infringement, including selling the novel variety. The district court held that the exemption from infringement in 7 U.S.C. § 2543 allows a qualified person to save seed of a protected variety from a crop produced by that person and to sell no more than the amount of seed that would have been needed to produce another crop on that person's farm. The Court of Appeals for the Federal Circuit reversed.

The questions presented are:

(1) Whether the Federal Circuit erred as a matter of law in holding that 7 U.S.C. § 2543 permits up to half of a farmer's crop produced from a protected novel plant variety to be sold as seed in competition with the owner of the novel variety?

(2) Whether the seed sales authorized by 7 U.S.C. § 2543 remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the purchaser that the seed being sold is a protected novel variety?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the district court and in the Federal Circuit are listed in the caption of the case. Pursuant to Supreme Court Rule 29.1, Asgrow Seed Company ("Asgrow") states that it is a wholly-owned subsidiary of The Upjohn Company. Asgrow has no other publicly-owned parents, subsidiaries, or affiliates.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 982 F.2d 486 and is reprinted in Pet. App. 1a-14a. The opinion of the district court is reported at 795 F. Supp. 915 and is reprinted at Pet. App. 15a-26a.

On March 25, 1993, the Federal Circuit simultaneously denied Asgrow's petition for rehearing and declined Asgrow's combined suggestion for rehearing in banc. Pet. App. 27a-28a. Judge Newman filed a separate opinion dissenting from the denial of rehearing in banc, and Judge Rader filed an additional opinion concurring in the denial of rehearing in banc. The two opinions accompanying the denial of rehearing in banc are reported at 989 F.2d 478 and are reprinted in Pet. App. 28a-38a.

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 1338(a). The jurisdiction of the Federal Circuit was invoked pursuant to 28 U.S.C. § 1292(a)(1) and 28 U.S.C. § 1292(c)(1). The Federal Circuit denied Asgrow's timely petition for rehearing on March 25, 1993. Pet. App. 27a-28a. The mandate of the Federal Circuit was stayed pending final disposition by this Court of the issues raised by the present writ. Pet. App. 39a. The Petition for Writ of Certiorari was filed on June 23, 1993 and granted on April 18, 1994. The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent statutory provision at issue is the "Right To Save Seed" set forth in the first sentence of 7 U.S.C. § 2543. The full text of 7 U.S.C. § 2543 has been reproduced in the Appendix attached to this brief and at Pet. App. 41a. In light of the relationship between section 2543 and the infringement provisions in 7 U.S.C. § 2541, the full text of 7 U.S.C. § 2541 is also set forth in the Appendix to this brief and at Pet. App. 40a-41a.

STATEMENT OF THE CASE

A. Overview Of The Plant Variety Protection Act

The Plant Variety Protection Act ("PVPA" or "Act"), 7 U.S.C. §§ 2321-2581, was established "to encourage the development of novel varieties of sexually reproduced plants and to make them available to the public, providing protection available to those who breed, develop, or discover them, and thereby promoting progress in agriculture in the public interest."¹ Sexually-reproduced plants in-

¹ See, e.g., Plant Variety Protection Act: Hearing on S. 3070 Before the Subcommittee on Agricultural Research and General Legislation of the Committee on Agriculture and Forestry, 91st Cong., 2d Sess. (June 11, 1970) (preamble).

clude many economically important crops that comprise a basic and indispensable segment of American agriculture, such as soybeans, wheat, cotton, barley, oats, rice, tomatoes, celery, and carrots.² In particular, the PVPA was designed to promote research and development by the private sector. See H.R. Rep. No. 1605, 91st Cong., 2d Sess. 1 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 1 (1970).

The PVPA provides "patent-like" protection to the breeder or developer of a new plant variety through plant variety protection certificates issued by the Plant Variety Protection Office ("PVPO") within the United States Department of Agriculture, 7 U.S.C. §§ 2402; 2421-27, and through enforcement actions in U.S. district courts.³ 7 U.S.C. § 2561. To be certified under the PVPA, a novel variety must have (1) "distinctness" in at least one identifiable characteristic from all prior known varieties in public knowledge, (2) "uniformity" in the sense that any variations are describable, predictable and commercially acceptable, and (3) "stability" so the variety, when sexually multiplied, will remain unchanged with regard to its essential and distinctive characteristics with a reasonable degree of reliability. 7 U.S.C. § 2401(a). The term of protection under the Act is 18 years. 7 U.S.C. § 2483(b).

A valid PVPA certificate entitles the owner to the exclusive right during the term of plant variety protection to "exclude others from selling the variety, or offering it for

² Asexually reproduced plants, such as those propagated by grafting or budding, have been legally protected since 1930 by Chapter 15 of the Patent Act, 35 U.S.C. §§ 161-164. See *Diamond v. Chakrabarty*, 447 U.S. 303, 313 (1980). A more extensive discussion of the history leading to the enactment of the PVPA is provided in the Brief Amicus Curiae Of The American Seed Trade Association In Support Of Petitioner.

³ See, e.g., *In re Bergy*, 596 F.2d 952, 984 (C.C.P.A. 1979), *aff'd*, *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); *Public Varieties of Mississippi, Inc. v. Sun Valley Seed Co.*, 734 F. Supp. 250, 251 & n.4 (N.D. Miss. 1990); D. Chisum, *Patents*, § 1.05[2] (1993).

sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom, to the extent provided by this chapter." 7 U.S.C. § 2483(a). Among the acts which infringe an owner's rights if performed without authorization are the following (listed by corresponding subsection of 7 U.S.C. § 2541): (1) "sell[ing] the novel variety, or offer[ing] it or expos[ing] it for sale, . . . or any other transfer of title or possession of it;" (3) "sexually multiply[ing] the novel variety as a step in marketing (for growing purposes) the variety;" or (6) "dispens[ing] the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received." Appendix; Pet. App. 40a.

In 7 U.S.C. § 2543, Congress listed limited exemptions from infringement for certain sales of a PVPA-protected novel variety. Section 2543 is entitled "Right to save seed; crop exemption." Paralleling that title, two distinct entitlements are set forth in the section. The first sentence of section 2543 constitutes what Congress described as a person's "right to save seed" and grants a limited right to sell "such saved seed" under specified conditions. The second sentence contains the distinct "crop exemption" which exempts from infringement any bona fide sales for *other than reproductive purposes*, made in channels usual for such other purposes, of seed produced on a farm from properly-obtained PVPA seed.⁴

The small portion of the Winterboers' crop of Asgrow PVPA-protected soybeans that they sold for non-reproductive purposes is not the subject of this case. As

⁴ Despite being part of the same statutory section, the legislative history confirms that the "Right to save seed" and the "crop exemption" are separate and distinct. See *infra* section I.C. However, the Federal Circuit erroneously labelled the entirety of 7 U.S.C. § 2543 as "the crop exemption" and used that incorrect designation throughout its opinion. See, e.g., Pet. App. 5a.

a result, the "crop exemption" in the second sentence of section 2543 is not directly applicable to the outcome of this case. Instead, the two legal questions presented here concern the proper statutory interpretation to be given the "right to save seed" in the first sentence of section 2543: (1) how much PVPA-protected seed can be sold under the terms of that exemption and (2) whether seed sold under authority of the exemption in the first sentence of section 2543 must be accompanied by the notice of protected variety status otherwise required by section 2541(6).

B. General Factual Background

Prior to the passage of the PVPA, what little research was done in the United States to develop self-pollinated plants was confined to the public sector because private investment was not economically justified. The development of new plant varieties requires a substantial investment of expertise, time, capital, land, and facilities that is most certainly beyond the resources of an individual farmer. Over a period of years, a plant breeder must undertake a myriad of research tasks and experiments with respect to each group of new plant populations isolated for study in the hope that a new commercially viable variety displaying advantageous yield, maturity, and/or disease-resistance traits will eventually be achieved. For each new variety that is eventually introduced to the public, many thousands of others have been isolated, studied, tested, and rejected.

Since Congress enacted the PVPA in 1970, the private development of novel plant varieties has had a profound effect on the productivity and global competitiveness of American agribusiness. Encouraged by the passage of the PVPA that they would be able to recoup the significant research and development costs, private seed companies invested heavily in new research programs to discover and develop novel seed varieties promising higher yields and crops more resistant to disease and adverse

environmental conditions. The PVPA prompted a boom in the availability of such novel varieties, contributing to a surge in the productivity of American agriculture and strengthening the position of the American farmer in the international marketplace. Unfortunately, the market success of the PVPA varieties led to abuses.

Sexually-reproduced plants produce crops yielding many multiples of the same seed that can then be used to produce future crops of plants with nearly identical characteristics to the original crop. For varieties such as tomatoes, lettuce, and celery, the seed of the sexually-multiplied plant is distinct from the primary value of the crop. In such cases, the seed of such varieties often can only be retained by sacrificing the crop (for instance, by letting a tomato "go to seed"). For other varieties such as cotton, both the seed and the crop (the cotton itself) can be retained from the same harvest. For other varieties such as wheat and soybeans, the primary value of the crop is the seed itself, which is the merchantable item whether later used for reproductive or for nonreproductive purposes. However, because such plants are self-generating, once a farmer obtains the seed of a PVPA-protected novel variety, that farmer can continue to grow successive crops of the same novel variety, and obtain the same beneficial results, without needing to purchase any additional seed from the seed company.

A farmer's crop will be used either for reproductive (seed) purposes or for non-reproductive (grain or feed) purposes. If a particular variety is disease-resistant and/or high-yielding, its seed will have great commercial value when used for reproductive purposes. The soybean varieties at issue here require approximately one bushel of soybeans when used as seed to plant an acre of land, and each bushel planted can produce yields of approximately 45 bushels of the same soybeans. Thus, for each acre planted, a farmer will easily be able to save enough soybeans as seed to replace the bushel that was originally

planted, and still have up to 44 (or more) bushels of soybeans to use or sell for other purposes. A soybean farmer will usually sell all or most of his crop to a grain elevator or processor, where the soybeans will be processed for various end uses. The farmer can also elect to have a portion of the soybean crop cleaned and stored for future use as seed.

Because soybeans cleaned for future use as seed are often stored in brown paper bags, such seed is commonly referred to as "brown bag" seed. Where the bagged seed is a PVPA-protected variety, a farmer will be able to sell "brown bag" PVPA seed at a much lower price than the certificate owner because the farmer does not have to recoup the owner's research, development, conditioning, production, and marketing costs.⁵ Thus, because a farmer's crop of a novel variety commands a higher price (and thus produces a higher profit for the farmer) when it is sold as seed than when it is sold as grain or feed, a farmer will be motivated to sell as much of his crop to others for use as seed as possible, subject only to the limits imposed by market conditions, by his own farm needs, or by law.

C. The Proceedings Below

Asgrow is the assignee of the Certificates of Plant Variety Protection covering the two PVPA-protected soybean varieties at issue in this case. These varieties are marketed by Asgrow under the designations A1937 and A2234. Respondents Denny and Becky Winterboer are farmers who grow primarily corn and soybeans on a farm of about 800 acres in Clay County, Iowa. When viewed collectively, a majority of all crops grown on the Winter-

⁵ For example, in 1990, the Winterboers sold their "brown bag" Asgrow soybean seed at an average price of \$8.70 per bushel. In contrast, Asgrow's sales agents charged between \$16.20 and \$16.80 for each bushel of Asgrow seed.

boers' farm was used or sold for nonreproductive purposes. However, nearly all of the Winterboers' crop of Asgrow's PVPA-protected soybeans was sold by them as "brown bag" seed, using the designations "1938" and "2235," respectively.

In 1990, the Winterboers used PVPA-protected soybean seed purchased from Asgrow to produce a crop of 12,037 bushels of Asgrow soybeans on 265 acres of their farm. The Winterboers then sold 10,529 bushels of that crop (over 87%) to others for use as seed, which was the maximum portion saleable as seed after broken or damaged soybeans had been removed. Each year since 1986, the Winterboers have sold their entire saleable Asgrow soybean crop to others for use as seed, and have purchased new seed directly from Asgrow to satisfy their own planting needs.

On January 24, 1991, Asgrow filed suit against the Winterboers in the United States District Court for the Northern District of Iowa, alleging infringement under 7 U.S.C. § 2541(1) for selling or offering to sell Asgrow's PVPA-protected novel soybean varieties, under 7 U.S.C. § 2541(3) for sexually multiplying Asgrow's novel varieties as a step in marketing those varieties for growing purposes, and under 7 U.S.C. § 2541(6) for dispensing Asgrow's novel varieties to another in a form which could be propagated without providing notice that the seeds were of a protected variety. The Winterboers defended by asserting that their activities were within the statutory exemption from infringement provided by 7 U.S.C. § 2543.

After both parties moved for summary judgment on liability, the district court granted Asgrow's motion and denied the Winterboers' motion. *See* Pet. App. 15a-24a. The district court held that "[s]aved seed shall be limited to the amount of PVPA-protected seed reasonably needed by the farmer who grew it to plant the number of acres of the protected variety, or its progeny, he or she needs

in the upcoming crop year." Pet. App. 24a. The district court also concluded that a farmer selling seed in accordance with 7 U.S.C. § 2543 was required to give notice that the seed sold was a protected variety, as required by 7 U.S.C. § 2541(6). Pet. App. 17a n.2. Holding that the Winterboers were in violation of 7 U.S.C. § 2541(1) and (3), the district court enjoined them from "selling any seed, except for saved seed, to other farmers, and/or engaging in any form of brown bagging." Pet. App. 24a.⁶

The Federal Circuit reversed, holding that 7 U.S.C. § 2543 did not contain any language that quantitatively limits a farmer's sale of PVPA seed to the amount of seed necessary to grow another crop. *See* Pet. App. A. Instead, the Federal Circuit held that section 2543 permitted up to half of every crop produced by any person from seed obtained by authority of the PVPA certificate owner to be sold as seed in competition with the certificate owner, as long as at least fifty percent of the seller's crop of that specific PVPA-protected variety is sold for nonreproductive purposes. Pet. App. 7a-13a.

The Federal Circuit interpreted the introductory clause to the first sentence of section 2543 to mean that a farmer within the terms of section 2543 remains subject to infringement liability under subsections (3) and (4) of 7 U.S.C. § 2541 but is exempted from liability for any acts prohibited by subsections (1), (2), (5), (6), (7), and (8). Pet. App. 6a, 13a. Based on that interpretation, the Federal Circuit disagreed with the district court's conclusion that any sales of PVPA-protected seed permitted under section 2543 were still subject to the notice requirement in 7 U.S.C. § 2541(6). Pet. App. 13a.

⁶ On November 14, 1991, the district court modified a footnote in its prior opinion to clarify that the issue of whether the Winterboers had complied with Iowa labelling law, as required by 7 U.S.C. § 2543, had not been reached. Pet. App. 25a-26a.

The only quantitative limitation on PVPA seed sales that the Federal Circuit was able to discern from the statutory language of the exemption was that the seller and buyer of brown bag seed had to be persons whose "primary farming occupation is the growing of crops for sale for other than reproductive purposes." 7 U.S.C. § 2543. The Federal Circuit also held that, because "[t]he PVPA separately protects each novel seed variety," the "primary farming occupation" determination must be made on "a crop-by-crop basis" with respect to each specific novel variety protected under the Act.⁷ Pet. App. 8a. In rejecting the district court's result along with its explanation, the Federal Circuit declared that "this court recognizes that, without meaningful limitations, the crop exemption could undercut much of the PVPA's incentives" but held that "[t]he Act, as written, however, contains no ensuing crop limitation as determined by the District Court." Pet. App. 12a.

Noting that section 2541(3) did not permit farmers to "market" protected novel varieties, the Federal Circuit cautioned that "an expansive reading of the term 'marketing' would swallow the entire crop exemption." Pet. App. 12a. To alleviate that concern, the Federal Circuit decided that "'[m]arketing' in the context of the PVPA is limited to extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet. App. 12a-13a. As a result, the Federal Circuit held that "[t]his form of marketing of sexually multiplied novel varieties violates exclusive rights under the Act, without regard to the crop exemption." Pet. App. 13a.

Judge Lourie, a member of the Federal Circuit panel, issued a concurring opinion that agreed solely with the

⁷ Due to its "crop-by-crop" methodology as to how the "primary farming occupation" determination was to be made, the Federal Circuit's analysis and ruling differed significantly from the Winterboers' position before the district court.

panel's result and with "the panel's discussion of the limitation on saved seed which was the basis for the district court's decision." Pet. App. 14a. However, Judge Lourie stated that "I cannot join the remainder of the [panel's] opinion because it attempts to characterize and interpret other parts of this complex statute that I believe are not before us and have not been briefed." ⁸ Pet. App. 14a.

In its combined petition for rehearing and suggestion for rehearing in banc before the Federal Circuit, Asgrow reiterated and clarified the basis for the legal conclusions that had been consistently urged by Asgrow throughout the case; *i.e.*, that a farmer could sell no more of his crop of a protected variety as seed under section 2543 than he would have needed to produce a crop on his farm in the following year and that any such seed sales under section 2543 were still subject to the notice requirement of section 2541(6). However, Asgrow's suggestion for in banc review was declined by a 6-5 vote. Pet. App. 28a.

Judge Newman issued an extensive opinion dissenting from the denial of Asgrow's suggestion for rehearing by the full Federal Circuit, stating that the panel "has reached an interpretation of [the first sentence of 7 U.S.C. § 2543] that is contrary to the statute and its purpose." Pet. App. 30a. Judge Newman further stated:

The Act was not designed to permit farmers to grow and sell seed of certified varieties as a business, to enter the commercial seed business in competition with the creator of the new variety. The panel majority, by allowing up to half of a farmer's crop to be

⁸ When ruling how a person's "primary farming occupation" was to be determined, the Federal Circuit did not have the benefit of any briefing. For purposes of the cross-motions for summary judgment, the parties had agreed that the Winterboers' "primary farming occupation" was the growing of crops for nonreproductive purposes. Moreover, the basis for such a comparison (*e.g.*, acres planted, crop size, income received, etc.) was also not at issue between the parties. Finally, neither party even suggested that the term "marketing" had anything other than its ordinary meaning.

sold as seed, authorizes this practice, in a travesty of statutory interpretation.

Pet. App. 32a (footnote omitted). Judge Newman also observed that "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. 30a. Judge Rader, the author of the Federal Circuit's opinion, took the unusual step of responding to Judge Newman's dissent. Four days later, he issued a separate opinion concurring in the denial of Asgrow's suggestion for rehearing. Pet. App. 28a-30a.

SUMMARY OF ARGUMENT

Under a proper reading of 7 U.S.C. § 2543, the amount of PVPA seed which can be saved and sold as seed by a farmer without liability can be no more than the amount of seed that is necessary to produce another crop on the farmer's own farm. In the first clause of section 2543, Congress limited the amount of PVPA-protected seed that a farmer could produce and later sell for reproductive purposes by providing an exemption from that section's terms "to the extent that such action" may constitute an infringement under 7 U.S.C. § 2541(3), which prohibits sexually multiplying the novel variety as a step in marketing the variety for growing purposes.

The Federal Circuit erred by interpreting the first clause in section 2543—"except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title"—as providing that a farmer remains subject to infringement under subsections (3) and (4) of section 2541 and as exempting the farmer from the other acts of infringement set forth in section 2541(1), (2), (5), (6), (7), and (8). Contrary to that analysis, it is the initial exception of section 2541(3) from the exemption in the rest of the first sentence of section 2543 that provides the quantitative limit

on the amount of a protected novel variety that a farmer can later sell for use as seed.

Through that initial incorporation of the terms of section 2541(3), the first sentence of section 2543 does not apply where a person has sexually multiplied a novel variety as a step in marketing the variety for growing purposes. At most, only the quantity of PVPA seed that was sexually multiplied *not* as a step in marketing the variety for growing purposes can be permissibly sold under the terms of the remainder of the first sentence in section 2543. That limited amount is the portion of the farmer's crop that he retains for use in the production of a crop on his farm. Moreover, it is the only portion of the crop produced to which the provision allowing a farmer to "sell such saved seed" under certain conditions even applies.

The sale of PVPA-protected seed produced by a farmer in an amount greater than what the farmer needed to plant his own farm is therefore outside the scope of the limited exemption for sales of "such saved seed" in section 2543, and remains an infringement under section 2541. By later providing in the first sentence of section 2543 that the provisions of section 2541(3) were to be disregarded with respect to sales of "such saved seed" made to other farmers and in compliance with state law, Congress permitted a farmer to "sell such saved seed" without being liable for having sexually multiplied that limited portion of his harvest as a step in marketing the novel variety for growing purposes. Not only are the two references to section 2541(3) in section 2543 not redundant, but both are needed to accomplish Congress' purpose for the PVPA.

Through its first reference to section 2541(3), Congress withheld nearly all of a farmer's harvest from the scope of the exemption set forth in the remainder of the first sentence of section 2543, *i.e.*, that portion of the harvest in excess of that which was needed as seed in the

production of a subsequent crop on that farmer's own farm. Then, by adding the second reference to section 2541(3) in the proviso, Congress removed section 2541(3) as an obstacle to the farmer's sale of "such saved seed" as allowed by section 2543. Thus, Congress allowed the farmers to avoid wasting any of their harvest without threatening the commercial viability of the private seed breeding industry that the PVPA was enacted to stimulate. No other interpretation gives significance to each word and phrase in the first sentence of section 2543.

The Federal Circuit also erred when it held that 7 U.S.C. § 2541(6) did not apply to whatever sales of "such saved seed" are permitted under section 2543. Section 2541(6) provides that no person may "dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received." Congress did not grant a blanket exemption for all acts listed as infringements in section 2541 when it allowed a farmer to sell "such saved seed" in section 2543; it only exempted the action specified in the statute—the selling of seed. Thus, the first sentence of section 2543 only exempts those portions of section 2541 that prohibit the action later exempted: certain "sales" of a protected novel variety that would otherwise infringe under section 2541(1) for being sales of a novel variety and under section 2541(3) for having been sexually multiplied as a step in marketing the variety for growing purposes.

Each act listed in section 2541 is a separate act of infringement. When Congress granted farmers a narrow exemption in section 2543 to sell "such saved seed" under certain conditions, Congress did not absolve such farmers from all liability for all other types of infringement that might accompany the act of selling "such saved seed" under section 2543. The Federal Circuit erred by holding that the absence of section 2541(6) from the introductory clause of section 2543 meant that any seed sales author-

ized by section 2543 were also exempted from the notice requirements in section 2541(6). When properly construed, the express terms of section 2543 do not alter or implicate the requirement for notice in section 2541(6) or its underlying policies.

Section 2541(6) remains applicable to all transactions in which the novel variety has been dispensed to another in a form which can be propagated, including sales of "such saved seed" under section 2543. The policies supporting giving notice to all recipients of a PVPA-protected seed remain constant, regardless of the manner in which the seed was dispensed. Moreover, requiring notice on all seed sales, whether "brown bag" seed or not, is consistent with Congress' intent in 7 U.S.C. § 2567 that a purchaser or user of the protected seed have actual notice of prohibited acts before being subject to damages for infringement.

With respect to both questions presented, the Federal Circuit failed to give proper effect to the statutory language as written and enacted by Congress. Because Congress did not enact the law that the Federal Circuit created through its erroneous interpretation of section 2543, that interpretation must be reversed by this Court.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO THE STATUTORY LANGUAGE, THE EXPRESS INTENT OF CONGRESS, AND THE STATED PURPOSES FOR THE ACT

The legal protection provided by Congress in the PVPA to owners of novel plant varieties is critical to the private seed breeding industry's continued and future research activities in developing new and improved varietal seeds and bringing them to the market. That vital and needed protection has now been effectively repealed by the Federal Circuit's flawed interpretation of 7 U.S.C. § 2543. Unless the intended meaning of the statutory language of the first sentence of section 2543 is restored by this Court on both legal issues presented, the renewed development and continued competitiveness of American agriculture in plant varieties will be crippled by a ruling that is contrary to the language of section 2543, its legislative history, and Congress' express intent and purpose for the Act.

The Act provides that "[i]t is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end, so as to afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties." 7 U.S.C. § 2581. Yet the Federal Circuit's construction of section 2543 subverts that congressional intent and eviscerates the incentives and protections that Congress intended the Act to provide. No statutory scheme of intellectual property protection, particularly one covering a commodity that reproduces itself many times over, could have been designed by Congress with such immense loopholes that completely undermine its purposes.

By construing the limited exemption from infringement in section 2543 so that the Winterboers are able to sell *over twenty-two times more soybean seed* than they planted, the Federal Circuit has truly formulated an ex-

ception that swallows the rule.⁹ Moreover, by simultaneously announcing that all seed sales made under section 2543 are exempted from the explicit statutory requirement in section 2541(6) that proper notice be given whenever the seed being dispensed is a PVPA-protected variety, the Federal Circuit has independently removed the incentives and protections provided by the PVPA, regardless of the quantity of seed sales permitted under section 2543.

Statutes should be construed to avoid attributing absurd results to Congress. *E.g.*, *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 453-55 (1989); *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892); *Oates v. First National Bank of Montgomery*, 100 U.S. (10 Otto) 239, 244 (1879). However, this is not a case in which the Court is being asked to interpret a statute in a manner contrary to its literal wording so that the statutory purpose or legislative intent can be preserved in spite of conflicting statutory language. In this case, the express wording of the statute, the explicit Congressional intent set forth in the Act itself, and the stated purposes and policies for the Act are entirely consistent. Instead, it is the interpretation by the Federal Circuit that creates the absurd consequences that are wholly inconsistent with the express language, history, and purpose of the Act.

A. By Excepting Action That Might Infringe Under Section 2541(3) From The Exemption Of Section 2543, Congress Limited The Amount Of A Novel Variety That Could Be Sold As Seed Under Section 2543

Section 2543 does not directly limit the amount of PVPA-protected seed that can be saved; it only limits the amount of such seed that can be saved *and* sold as seed.

⁹ See, e.g., *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (any exemption from legislation must be narrowly construed, giving due regard to the plain meaning of the statutory language and the intent of Congress).

Without more, the mere act of saving the crop of a novel variety produced from "authorized seed"¹⁰ is not an infringement under any subsection of 7 U.S.C. § 2541.¹¹ A farmer may plant, grow, and harvest as much of a protected novel variety as he is able, as long as he only saves it, uses it himself, or sells it to another for non-reproductive purposes. Infringement issues usually arise only when a farmer competes with the PVPA certificate owner by selling PVPA seed produced on his farm.

Allowing farmers to sell their crops of PVPA-protected varieties as seed at prices well below what the owner of the novel variety must charge to recover its development costs, will eventually strangle the private plant breeding industry that the PVPA was enacted to stimulate. Recognizing that, Congress provided a quantitative limitation in section 2543 on the amount of PVPA-protected novel variety seed produced by a farmer that could be sold for reproductive purposes to other farmers.

The Federal Circuit construed section 2543 so that the "primary farming occupation" phrase operates as the only quantitative restriction on the amount of a novel variety that may be sold as seed. However, that is not the quantitative limitation created or intended by Congress.¹² As

¹⁰ In accordance with the express language in section 2543, the term "authorized seed" is used herein by Asgrow to signify any "seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes." See Pet. App. 41a.

¹¹ Where a farmer has saved more seed than he could reasonably use to produce another crop on his farm, any portion of that excess saved seed that is later sold for reproductive purposes is an infringement under section 2541(3) not because it was saved as seed, but because it necessarily must have been sexually multiplied as a step in marketing the novel variety for growing purposes.

¹² See Pet. App. 36a (Newman, J., dissenting) ("[t]he panel has misinterpreted this text, for this provision is directed to whether a farmer may sell *any* saved seed, not how much seed the farmer may sell (emphasis in original)).

shown below, the first sentence of section 2543, as enacted by Congress, contains the specific quantitative limitation on a farmer's right to sell PVPA seed that was identified by Asgrow and the district court—that amount of seed needed by the farmer to produce another crop on his farm.

1. *The Federal Circuit Misconstrued The Introductory Clause Of Section 2543 And Its Incorporation Of Section 2541(3)*

"It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 683 (1985) (citation omitted). Section 2543 starts with the following language:

Except to the extent that such action may constitute an infringement under subsection (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him . . . and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section (Emphasis added.)

Pet. App. 41a. The Federal Circuit concluded that the introductory clause meant that a farmer falling within the exemption set forth in section 2543 remains subject to infringement under subsections (3) and (4) of 7 U.S.C. § 2541, but not under subsections (1), (2), (5), (6), (7), and (8). Pet. App. 6a. That construction distorts the words and phrasing used by Congress in section 2543 and skews the relationship between section 2543 and the provisions in section 2541.

When the initial portion of section 2543 is given its proper effect, it is clear that the amount of PVPA seed that can be saved and sold as seed by a farmer is limited to precisely what Asgrow contends that Congress provided in the statute. Under section 2541(3), it is an act of infringement to "sexually multiply the novel variety as a step in marketing (for growing purposes) the variety."

Pet. App. E, p. 40a. Contrary to the Federal Circuit's analysis, the introductory clause of section 2543 only means that the exemption in the rest of the first sentence in the statute does not apply if the action in question constitutes sexually multiplying a PVPA-protected novel variety as a step in marketing the variety for growing purposes.¹³

In this case, there can be no question that the Winterboers "sexually multiplied" a protected novel variety because it is not disputed that they produced approximately 45 bushels of soybeans from each bushel of Asgrow seed planted. It is also undisputed that the Winterboers sold nearly all such soybeans produced for use as seed (*i.e.*, for growing purposes) without authorization from or compensation to Asgrow. Thus, the sole remaining question is the extent to which that action by the Winterboers constituted "a step in marketing" the Asgrow soybean varieties for growing purposes.

Absent an express definition in the statute, the term "marketing" in section 2541(3) should be given its ordinary, common meaning. *E.g.*, *Perrin v. United States*, 444 U.S. 37, 42 (1979). Without support, however, the Federal Circuit announced that "'marketing' in the context of the PVPA is limited to extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet. App. 12a-13a. However, it is "selling" that is a subset of "marketing," not vice versa. *Cf. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 215 (9th Cir.) ("We think the term *marketing* is far broader than the word *sell*."), *cert. denied*, 419 U.S. 999 (1974).

¹³ Because the Winterboers were not alleged to have infringed under 7 U.S.C. § 2541(4), the introductory clause of section 2543 will be discussed herein only in terms of its incorporation of the provisions of section 2541(3).

For purposes of section 2541(3), "marketing" can only be interpreted to include *all* acts that lead up to and include selling PVPA seed for reproductive purposes, including direct farmer-to-farmer sales of saved seed.¹⁴ In all cases where PVPA seed has been sold by a person who produced that seed, the "sexual multiplication" of the novel variety which led to that person having any seed to sell is clearly "a step" in the marketing of the novel variety for growing purposes. Without that step, there would be no seed for the farmer to sell.

2. The Only Portion Of A Crop Produced From Authorized Seed That Can Be Sold As Seed Under Section 2543 Is The Amount Needed To Produce Another Crop On The Farmer's Own Farm

Congress provided a specific quantitative limitation on the amount of PVPA seed that can be sold under section 2543 by expressly excepting action that might constitute an infringement under section 2541(3). That limitation is the portion of a farmer's crop that was sexually multiplied *not* as a step in marketing the novel variety, but only for future use as seed on the farmer's own farm. It is only that amount of saved seed that can be permissibly sold to others for use as seed under the remainder of the first sentence in section 2543, and it is that amount which is the maximum part of a farmer's crop that can be the "such saved seed" to which the rest of that first sentence applies.

¹⁴ *Webster's New World Dictionary*, 828 (3d col. ed. 1988), defines "marketing" as (1) "the act of buying and selling in a market" and (2) "all business activity involved in the moving of goods from the producer to the consumer, including selling, advertising, packaging, etc." The Federal Circuit relied on the same dictionary to obtain the "customary meaning" of the term "primary" as used in section 2543. Pet. App. 8a. There is no indication that Congress used ordinary definitions for some common words in section 2543 but not for others. *See* Pet. App. 35a; *see also* Brief of United States as Amicus Curiae, at 10 n.7 (hereinafter "U.S. Petition Brief").

To illustrate, assume that a farmer with a 1,000-acre farm plants Asgrow's PVPA-protected soybean seed on his farm (using 1 bushel of seed per acre) and produces a crop of 45,000 bushels (45 bushels per acre). Under the Federal Circuit's interpretation of section 2543, that farmer could then sell up to 22,500 bushels of his crop to other farmers for use as seed, *i.e.*, over twenty-two times more seed than that sold to the farmer by the certificate owner. In stark contrast, Asgrow contends that the exemption in section 2543 expressly limits that same farmer to selling no more than the 1000 bushels of seed needed to produce another crop on his farm, as concluded by the district court.¹⁵

In that situation, the most that the farmer would need to save to use in the production of another crop on his farm would be 1,000 bushels (1 bushel of seed per acre). If the farmer saves more than 1,000 bushels to use as seed, he must be presumed to have done so in order to sell it as seed because that excess seed will not be needed to produce a crop on his farm. Thus, any of the remaining 44,000 bushels from his crop that are sold for use as seed are outside the scope of the exemption in the first sentence of section 2543 because such seed will necessarily have been sexually multiplied as a step in marketing the novel variety for growing purposes.

¹⁵ Under the facts of this case, the Winterboers produced 12,037 bushels of Asgrow PVPA-soybeans on 265 acres of their 800-acre farm. Asgrow contends that section 2543 limits them to saving and selling no more than the amount of seed needed to replant a crop on their farm. Under the Federal Circuit's interpretation, the Winterboers could have lawfully sold up to 6,018 bushels of their Asgrow soybean crop as seed (they actually sold 10,529 bushels). In contrast, the Winterboers contended that they could have sold all 12,037 bushels as seed because they sold their non-soybean crops for nonreproductive purposes and earned less than 25% of their income from soybean seed sales. Under that view, they would have been able to sell more than 24,000 bushels of Asgrow seed (if they had produced that much) before their "primary farming occupation" was no longer the growing of crops for nonreproductive purposes.

The 1000 bushels of seed is the maximum amount that the hypothetical farmer could possibly have produced *without* having undertaken sexual multiplication as a step in marketing the protected variety for growing purposes. Those 1000 bushels of soybean seed saved to plant the farmer's own farm constitute the "such saved seed" referenced in section 2543. Thus, the Federal Circuit plainly erred when it concluded that "section 2543 does not contain any explicit limit that a farmer can save and sell only as much seed as necessary to plant an ensuing crop." Pet. App. 11a. Contrary to that court's analysis, it is the initial exception of section 2541(3) from the exemption in section 2543 that provides the quantitative limit on the amount of a protected novel variety that a farmer can later sell for use as seed under the terms of the statute, *i.e.*, the amount of seed necessary to produce a crop in that variety on the farmer's own farm.¹⁶

The only farming tradition that Congress sought to uphold through the "right to save seed" provision of section 2543 was the pragmatic practice of farmers saving enough seed from their crop to replant their own farms. Pet. App. 32a. What Congress allowed in that sentence was the sale of "such saved seed" between farmers when the selling farmer had a change of plans and no longer needed the seed that he had saved for his own use in planting his own farm. Under that provision, when properly interpreted, no portion of the farmer's crop would go unused but no incentive would be created to cause the farmer to save more seed than would be needed on his

¹⁶ Contrary to the Federal Circuit's opinion (Pet. App. 11a), the district court did not hold that one bushel of seed per acre was the applicable limit under section 2543 for all varieties. Unlike the Federal Circuit, Congress and the district court recognized that the amount of seed needed to be planted per acre will differ for each novel variety at issue. See Pet. App. 21a-22a & n.3. For that reason, section 2543 was written by Congress with functional terms that are applicable and quantifiable for any type of crop, size of farm, or other specific circumstances.

own farm. Congress never intended to preserve a farmer's ability to sell seed in commercial quantities, or to provide a vehicle by which traditional farmers would be tempted to become seed dealers in protected varieties.¹⁷

B. After Limiting The Amount Of Saved Seed, Congress Allowed Sales Of "Such Saved Seed" To Take Place Between Farmers Without Violating Section 2541(3)

Congress did not prohibit *all* sales of PVPA seed by persons other than the owner. To the extent that "such saved seed" is not actually used to produce a crop on the farmer's farm, that limited amount of saved seed is available to be sold as provided.¹⁸ The applicable provision is as follows:

Provided, That without regard to the provisions of section (3) of section 2541 of this title, it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

Pet. App. 41a (emphasis added). After misconstruing the first reference to section 2541(3) in the introductory clause of section 2543, the Federal Circuit then failed to attribute any independent meaning to the second reference to section 2541(3) in the above provision.

¹⁷ See Pet. App. 32a (Newman, J., dissenting) ("The Act was not designed to permit farmers to grow and sell seed of certified varieties as a business, to enter the commercial seed business in competition with the creator of the new variety.").

¹⁸ In the previous example, the farmer could plant the 1,000 bushels of saved seed to produce another crop on his farm, or sell some or all of "such saved seed" to other farmers under the terms of section 2543. However, no more than a total of 1000 bushels of saved PVPA-protected seed could be planted *and* sold by that farmer.

"[A] statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, — U.S. —, 112 S.Ct. 1011, 1015 (1992); see also *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914). The Federal Circuit assumed that the two references to section 2541(3) were redundant, as its sole mention of them was the following: "[i]n two explicit references, the Act clarifies that the crop exemption does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541." Pet. App. 12a. That construction is simply wrong. Not only are the two references to section 2541(3) not redundant, but Congress included both for a specific reason.

If the second reference to section 2541(3) had not been included by Congress in section 2543, a farmer would still be unable to sell *any* of the PVPA seed saved for use on his own farm because, as soon as the farmer decided to sell some of his "saved seed" to another, the seed being sold would then have been sexually multiplied as a step in marketing it for growing purposes. By providing that the provisions of section 2541(3) are to be disregarded with respect to "such saved seed" sold in compliance with state law by a farmer to other farmers, Congress permitted a farmer to sell "such saved seed" (but no more) without being liable for having sexually multiplied that portion of his harvest as a step in marketing the novel variety for growing purposes (regardless of how narrowly or broadly the term "marketing" is defined).

The two distinct references to section 2541(3) in section 2543 were both necessary to accomplish Congress' stated purpose for the PVPA. Through its first reference to section 2541(3) in the initial clause, Congress withheld nearly all of a farmer's harvest from the scope of the exemption set forth in the remainder of the first sen-

tence of section 2543, *i.e.*, that portion of the harvest in excess of that which was needed as seed in the production of a subsequent crop on that farmer's own farm. By so limiting the scope of the exemption, Congress afforded seed companies the opportunity to recoup the sizeable investments which resulted in the novel variety in the first place. Then, by adding the second reference to section 2541(3) in the proviso, Congress removed section 2541(3) as an obstacle to the farmer's sale of "such saved seed" as allowed by section 2543. In that manner, Congress allowed the farmers to avoid wasting any of their harvest without threatening the commercial viability of the private seed breeding industry it sought to stimulate.

Far from reaching an absurd result, Asgrow's interpretation gives effect to both references to section 2541(3) and is true to the purposes that the PVPA was designed to foster.¹⁹ See *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643-45 (1978). The same cannot be said of the interpretation made by the Federal Circuit or the one offered by the Winterboers. As aptly stated by Judge Newman, the Federal Circuit's construction of the first sentence of 7 U.S.C. § 2543 as allowing up to half of every crop produced from PVPA-protected seed to be sold as seed is truly "a travesty of statutory interpretation." Pet. App. 32a.

¹⁹ Congress would not have excluded action constituting an infringement under section 2541(3) from the scope of the exemption in section 2543 only to permit that same action to fall within the exemption when sales of "such saved seed" were later allowed without regard to the provisions of section 2541(3). To conclude otherwise would be to impermissibly hold that the two references to section 2541(3) in section 2543 would be self-cancelling and without significance. See, *e.g.*, *Connecticut National Bank v. Germain*, — U.S. —, 112 S.Ct. 1146, 1149 (1992).

C. The Legislative History Confirms That The Right To Sell "Such Saved Seed" Is Limited To The Amount Needed For Producing A Crop On The Farm

Asgrow's interpretation is entirely consistent with the applicable legislative history, which shows that section 2543 is a combination of two proposed provisions originally considered by Congress in the following form:

Sec. 112. Right to Save Seed.

Except under subsections (3) and (4) of section 111, it shall not infringe any right hereunder for a person to save seed and grow the resulting variety for his own use.

Sec. 114. Crop Exemption.

It shall not be an infringement to sell seed grown from the protected variety, obtained (for growing) by authority of the proprietor or by saving seed under section 112, for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose, and is in channels which are usual for that purpose and in a manner exclusively for that purpose.

S. Rep. No. 3070, 91st Cong., 1st Sess. (1969), H.R. Rep. No. 13631, 91st Cong., 1st Sess. (1969). At that time, the proposed legislation contained no right to sell a protected variety for use as seed.

Sections 112 and 114 (and their titles) were later combined into a single section (Sec. 113) that is now 7 U.S.C. § 2543. Both houses of Congress summarized the newly-created ability of a qualified farmer to sell "such saved seed" for reproductive purposes as follows:

Section 113. Right to Save Seed. Crop Exemption.

This section authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; to save seed from such crop for future use or planting on the farm; or, if his primary

farming occupation is the growing of crops for sale for other than reproductive purposes, *to sell such saved seed for reproductive purposes* to other persons so engaged.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970); S. Rep. No. 91-1138, 91st Cong., 2d Sess. 12 (1970) (emphasis added). From those summaries, it should have been clear that the right to sell a protected novel variety was restricted only to the seed saved from the farmer's crop "for future use or planting on the farm."

Despite quoting the same provision in the legislative record, the Federal Circuit somehow reached the opposite view of its plain language, holding that "[a]t no point did the legislative context for the text of the 1970 Act suggest that the crop exemption contains an ensuing crop limitation." Pet. App. 10a. On the contrary, the "suggestion" from the legislative history sought in vain by the Federal Circuit is quite explicit, and should have been persuasive support for the interpretation urged by Asgrow.

II. THE NOTICE REQUIREMENTS OF SECTION 2541(6) MUST APPLY TO ANY SALES MADE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 2543

The second important statutory interpretation question presented is whether any sales of PVPA-protected seed authorized by 7 U.S.C. § 2543 remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the purchaser that the seed being sold is a PVPA-protected novel variety.²⁰ Section 2541(6) provides that

²⁰ This Court need not address the sufficiency of the specific notice by the Winterboers when resolving the legal question of whether section 2541(6) notice is required on seed sales made under section 2543. However, Asgrow submits that notice under section 2541(6) should be required as a matter of law to be given simultaneously with the transaction in question so as to alert the

it is an infringement of the rights of the owner of a novel variety to "dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received."²¹ Pet. App. 40a. In its order, the district court specifically held that "[t]his court interprets this language [in section 2541(6)] to require that if a farmer does sell saved seed to another farmer he must label it as a protected variety." Pet. App. 17a, n.2.

In reversing, the Federal Circuit relied on its erroneous construction of the initial clause in section 2543, *i.e.*, that a farmer remains subject to infringement liability under subsections (3) and (4) of section 2541 but is exempted from liability for the acts set forth in section 2541(1), (2), (5), (6), (7), and (8). *See* Pet. App. 13a ("[b]ecause subsection (6) [of section 2541] is not included as an exception to the crop exemption, a qualifying sale under section 2543 remains exempt from the notice requirement"). Just as that incorrect analysis of the initial clause of section 2543 precipitated legal error with respect to how much PVPA-protected seed can be sold by a qualified farmer, the Federal Circuit erred in holding that farmers selling brown bag PVPA-protected seed are no longer subject to the notice provision of section 2541(6) when selling under the "saved seed" exemption in section 2543.

The question of whether section 2541(6) notice applies to section 2543 seed sales has great importance to the future effectiveness and enforcement of the PVPA.

recipient to the PVPA and its terms. The Winterboers admittedly did not do so. Tr. 32-33 (Injunction Hearing, March 26, 1991).

²¹ A parallel provision in patent law is found in 35 U.S.C. § 287, referred to as the patent "marking" statute. *See, e.g., American Medical Sys. v. Medical Eng. Corp.*, 6 F.3d 1523, 1538 (Fed. Cir.) (the purpose of section 287 is "to encourage the patentee to give notice to the public of the patent"), *cert. denied*, 62 U.S.L.W. 3722 (1994).

In its amicus curiae brief in support of the petition, the United States agreed that the issue as to whether section 2541(6) applies to brown bag seed sales warrants review by this Court in conjunction with review of the first question presented. *See* U.S. Petition Brief, at 20 n.17. At the same time, the United States suggested that the district court had “decline[d] to rule on the Section 2541(6) issue.” *Id.* However, not only does footnote 2 in the district court’s opinion show that the section 2541(6) notice question presented here was decided by that court, Pet. App. 17a n.2, but that question has been at issue at all times throughout this case.²²

The belief that the district court did not decide the section 2541(6) notice issue overlooks the distinction drawn by that court between the federal “notice” requirement in section 2541(6) and state “labeling” laws as incorporated into section 2543. The notice issue only required the district court to construe the effect of section 2543 on the requirements of section 2541(6) by interpreting the express language of the PVPA already at issue. That analysis resulted in footnote 2 of the district court’s opinion. In contrast, the “labeling” requirement of section 2543 arises from its separate provision that any sales of “such saved seed” must comply with “such State laws governing the sale of seed as may be applicable.” Pet. App. 41a; *see, e.g.*, Iowa Code, § 199 (1989). By not addressing the Winterboers’ compliance

²² Asgrow’s complaint pled the section 2541(6) notice issue. JA 38-39. Asgrow’s motion asserted liability on that basis. *See* Asgrow Memorandum In Support Of Its Motion For Summary Judgment, at 5. The district court held that any sales of PVPA seed under section 2543 remained subject to the notice requirement of section 2541(6). Pet. App. 17a n.2. On appeal, Asgrow raised the notice issue as a basis for affirming the district court’s finding of liability, that notice issue was then briefed by both parties, and was decided by the Federal Circuit. Pet. App. 13a. Finally, Asgrow raised the notice issue as the second question presented in its petition for certiorari without objection by the Winterboers, and certiorari was granted by this Court on both questions.

with state law, the district court avoided an unnecessary analysis of Iowa state seed law, which has labeling and other requirements independent of the notice required by Congress in section 2541(6).²³

Without doubt, this Court properly decided to review the section 2541(6) notice issue in conjunction with the issue of how much PVPA-protected seed can be sold under section 2543. As noted, the Winterboers made no procedural objection under Sup. R. 15.1 to the notice issue being raised in Asgrow’s petition. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 383-84 (1989). Instead, the Winterboers only addressed the merits, asserting that “[w]hether the Federal Circuit’s correct ruling on [the notice] issue should be reviewed by this Court requires no more than a cursory reading of section 2543, which is unambiguous on this point.” Opposition to the Petition for Certiorari, p. i, at n.*. As shown below, the “cursory” analysis offered by the respondents is simply wrong. Moreover, the statutory construction devised by the Federal Circuit that section 2543 exempts sales of “saved seed” from the notice requirement of section 2541(6) should be reversed as a matter of law.

²³ A farmer selling seed under section 2543 is required to comply with any applicable state law requirements in addition to those in the PVPA. Pet. App. 41a. However, state seed laws apply to all seed, not just to seed of protected novel varieties. Only two states presently require Plant Variety Protection labeling as a matter of state law. *See* Ariz. Rev. Stat. Ann. § 3-237(6) (1993); Colo. Rev. Stat. § 35-27-113(1)(g-h) (1993). Because the important protections of the Act should not be allowed to vary from state to state, to the extent that any state’s seed laws require less or different notice than that specified by Congress in the PVPA, such state laws should not excuse non-compliance with section 2541(6). *See, e.g., Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (“states are free to regulate the use of . . . intellectual property in any manner not inconsistent with Federal law”).

A. Section 2543 Only Provides A Limited Exemption From Infringement For Certain Sales Of Protected Seed That Would Otherwise Infringe Under Subsections (1) And (3) Of Section 2541

The legal conclusion urged by Asgrow that the notice requirement of section 2541(6) applies to all sales of seed under section 2543 flows directly from the language used by Congress in the two statutes. Section 2541 lists the acts which shall be an infringement of the rights of the owner of a novel variety, "[e]xcept as otherwise provided in this subchapter." Pet. App. 41a. Because Congress did provide otherwise in section 2543 with respect to certain sales of PVPA seed, infringement liability is avoided for those acts which were specifically exempted in section 2543 when performed in accordance with the other conditions of the statute.²⁴

The first sentence of section 2543 can only properly be construed as providing a limited exemption from infringement solely with respect to those portions of section 2541 that prohibit the specific "action" later exempted: certain sales of a protected variety that would otherwise be infringements under subsections (1) and (3) of section 2541. The only actions affected by the first sentence of section 2543 are (1) saving seed produced, (2) using such saved seed in the production of a crop for use on the farm, and (3) using such saved seed for sale as provided. Pet. App. 41a. Two of those acts—saving seed and using seed to produce a crop for use on the farm—are not prohibited under any part of section 2541 and thus do not need to be exempted in order to be per-

²⁴ See, e.g., *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, — U.S. —, 114 S.Ct. 517, 524-25 (1993) (must generally adhere to "tight reading of exemptions from comprehensive schemes"); *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) (where general statement of policy is qualified by exception, exception is read narrowly to preserve the primary operation of the provision); *Phillips*, 324 U.S. at 493.

formed. Only the third act—selling PVPA-protected seed—is otherwise an act of infringement. Thus, only the act of selling "such saved seed" was exempted by Congress.

Under the terms of the exemption in the first sentence of section 2543, Congress expressly allowed a person "to sell such saved seed" without incurring liability under section 2541(1) for "sell[ing] the novel variety" to the extent that the sales of the protected variety are made in accordance with the other provisions of section 2543. In addition, because of the second reference to section 2541(3) in the proviso of section 2543, there is also no liability under section 2541(3) for having "sexually multipl[ied] the novel variety as a step in marketing (for growing purposes) the variety" to the extent that the sales in question are limited in quantity to "such saved seed" as provided by section 2543. See *supra* section I.B. However, those express exemptions from the acts of infringement set forth in subsections (1) and (3) of section 2541 are the sole extent of the exemptions provided by Congress in section 2543.

No other subsection of section 2541 is implicated by the limited exemption for seed sales under section 2543, including the acts prohibited by section 2541(6): dispensing a novel variety to another in a form which can be propagated without giving notice of it being a protected variety.²⁵ In addition to subsection (6), the other "non-sale" acts listed in subsection (1) and all of the acts covered by subsections (2), (5), (7), and (8) of section

²⁵ As used in section 2541(6), the term "dispense" is not limited only to sales of a protected novel variety. Cf. *Palmer v. United States*, 340 F.2d 48, 50 (5th Cir. 1964) (the term "dispense" is broader than more narrow term "sell"), *cert. denied*, 382 U.S. 903 (1965). Thus, section 2541(6) should be interpreted as being applicable to any distribution, sale, or transfer of ownership or possession of a protected novel variety in a form which can be propagated, including but not limited to any seed sales made in accordance with section 2543.

2541 should remain applicable to any seed sales authorized under section 2543. For example, a farmer who sells PVPA seed under section 2543 is still not able to export the novel variety in violation of section 2541(2) merely because section 2543 permits him to sell to another farmer that limited amount of PVPA seed that had been saved to produce another crop on his own farm.

By virtue of being one of many acts listed in section 2541, the act of selling a novel variety is distinct from the other acts of infringement listed by Congress. Because each listed act is a separate act of infringement,²⁶ Congress did not exempt all other distinct acts of infringement when it expressly allowed only certain sales of seed in accordance with the terms of section 2543. Thus, by exempting only *sales* of "such saved seed" from infringement liability, Congress did not also exempt the importation or exportation of "such saved seed" of a novel variety under section 2541(2), did not exempt the use of "such saved seed" to produce a hybrid or different variety under section 2541(4), and did not exempt using "such saved seed" to instigate or actively induce other acts of infringement under section 2541(8). Most importantly for present purposes, Congress did not authorize the seller to dispense "such saved seed" without notice under section 2541(6) that the seed is of a protected variety.

By seeking to recover for any sales of Asgrow PVPA-protected soybean seed that were made by the Winterboers without the notice required by Congress, Asgrow is properly seeking to enforce the separate infringement provision in section 2541(6) that a protected novel va-

²⁶ The same is true under the patent laws, which give patentees three distinct and independent rights; *viz.*, the right to make, the right to use, and the right to sell. See 35 U.S.C. §§ 154, 271(a); *Daimler Mfg. Co. v. Conklin*, 170 F. 70, 71 (2d Cir. 1909), *cert. denied*, 216 U.S. 621 (1910); *Whittemore v. Cutler*, 29 F. Cas. 1120, 1121 (No. 17,600) (C.C.D. Mass. 1813).

riety may not be dispensed to another in a form that can be propagated without notice of being a protected variety. To the extent that any such acts of "dispensing" Asgrow's protected novel variety constitute authorized sales of seed under section 2543, only section 2541(6) would be at issue because Asgrow would not be entitled to prove liability under those portions of sections 2541(1) and 2541(3) which have been exempted by Congress with respect to such sales. However, to the extent that any acts of selling Asgrow PVPA seed exceed the quantitative limit on such sales found in section 2543, Asgrow could assert and would be entitled to prove liability under subsections (1), (3), and (6) of section 2541, as properly happened in this case.

The interpretation that Congress did not allow seed sales under the first sentence of section 2543 to be made without notice is further supported by the last sentence of section 2543. In the latter sentence, Congress expressly provided that a purchaser who diverts PVPA-protected seed to reproductive purposes from the usual channels used in selling such seed for nonreproductive purposes shall be deemed to have notice for purposes of section 2567 that his actions constitute an infringement. Pet. App. 41a. Congress surely would not have provided for imputed notice to purchasers in that situation while simultaneously providing the immense loophole from providing express notice allowed by the Federal Circuit with respect to sales of PVPA seed under section 2543. See also Brief Of Amicus Curiae Intellectual Property Owners In Support Of The Petition, at 7. The inescapable legal conclusion is that Congress did not exempt any seed sales permitted under section 2543 from the requirements of section 2541(6).

The Winterboers' assertion that notice is not required on their brown bag seed sales arises from a myopic reliance on the phrase "it shall not infringe any right hereunder" as a talisman against all infringement liability

when seed sales are made under section 2543. According to them, that phrase signifies that Congress eliminated all types of infringement liability for any of the acts listed in section 2541 whenever PVPA-protected seed is sold in accordance with section 2543. That "cursory" analysis fails to recognize that the only "action" which Congress stated "shall not infringe any right hereunder" was limited solely to the act of selling seed, under the circumstances specifically recited in the statute. Thus, any reliance on that phrase to excuse other infringing acts taken in addition to or in conjunction with the limited statutorily-authorized act of selling PVPA-protected seed is mistaken.

Similarly, the Federal Circuit's analysis concluding that section 2541(6) notice was not required for seed sold in accordance with section 2543 stemmed from its misapprehension of the significance of the initial clause of section 2543. As previously shown, the clause "[e]xcept to the extent that such action may constitute an infringement under subsections (3) and (4)" does not except subsections (3) and (4) of section 2541 from the remainder of section 2543. Instead, that initial clause of section 2543 operates to remove nearly all of a farmer's crop from the scope of the exemption in the remainder of the first sentence, but does not exempt the applicability of sections 2541 (1), (2), and (5) through (8) to "saved seed" sales made under section 2543. *See supra* section I.A.

If Congress had intended to exempt seed sales made under section 2543 from the statutory notice provisions, it could have done so by including a reference to section 2541(6) together with the second reference to section 2541(3) following the term "*Provided*" in the first sentence of section 2543. In that case, any sales of "such saved seed" under section 2543 would not give rise to liability for omitting the notice otherwise required by section 2541(6) in the same manner that the proviso in the

first sentence of section 2543 allows such seed to be sold "without regard to the provisions of section 2541(3)." Pet. App. 41a. However, that is not what Congress did. Because Congress did not allow any PVPA seed to be sold under section 2543 without regard to the notice provisions of section 2541(6), it was not within the province of the Federal Circuit to create such an exemption.²⁷

B. The Policies Supporting Giving Notice To All Recipients Of PVPA-Protected Seed Remain Constant, Regardless Of The Type Of Transaction Involved

In enacting section 2541(6), Congress expressly provided that notice was to be given of the PVPA-protected status of any novel variety seed being dispensed to another and that dispensing PVPA-protected seed without such notice would give rise to infringement liability. Under this statutory scheme, if a party legitimately dispenses the owner's PVPA seed with proper notice, any future infringement liability arising from the unlawful sale or transfer of that seed or its progeny attaches to the party receiving the seed, who now has been put on notice of the seed's PVPA-protected status (and presumably of the PVPA's terms and conditions). On the other hand, if proper notice is not given at the time of sale, the party dispensing the PVPA-protected seed into the market without the required notice at least remains subject to infringement liability for having done so.

The underlying policy for encouraging notice is reflected in the restrictions imposed by Congress in 7 U.S.C. § 2567 on a certificate owner's remedies in the absence of notice. In pertinent part, section 2567 provides:

²⁷ *See, e.g., Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) (courts "are not at liberty to create an exception where Congress has declined to do so"); *Fedorenko v. United States*, 449 U.S. 490, 513 n.35 (1981) ("It is not the function of the courts to amend statutes under the guise of 'statutory interpretation.'" (citation omitted)).

In the event the novel variety is distributed by authorization of the owner and is received by the infringer without such marking, no damages shall be recovered against such infringer by the owner in any action for infringement, unless the infringer has actual notice or knowledge that propagation is prohibited or that the variety is a protected variety, in which event damages may be recovered only for infringement occurring after such notice. As to both damages and injunction, a court shall have discretion to be lenient as to disposal of materials acquired in good faith by acts prior to such notice.

See Appendix. If the purchaser of PVPA-protected seed does not receive notice of its protected status, he or she may not be aware of the statutory conditions on the later disposition of the crop produced from that seed. Even if "brown bag" seed is not considered to be distributed by authority of the certificate owner, the last sentence of section 2567 will hamper the owner's ability to obtain damages and/or an injunction against an "innocent" seed seller who purchased the brown bag seed in good faith without notice that it was a PVPA-protected variety.

By requiring that notice be given on *all* sales of PVPA-protected seed, whether by the owner or under the exemption of section 2543, Congress safeguarded an owner's ability to protect its investment once the novel variety was introduced into the marketplace. As one example, assume that a brown bagger sold the amount of protected soybean seed authorized under section 2543, but did so without complying with section 2541(6). When planted, the "unmarked" seed would be multiplied by a factor of 45 and the resulting crop could be sold for reproductive purposes. However, section 2567 could foreclose the owner from obtaining any remedy, regardless of how much seed was later sold from the crop produced from the "unmarked" seed, even though the lack of notice occurred through no fault of the owner. Thus, once "unmarked" seed is dispensed into commerce, the ability of a certificate owner

to protect its investment and statutory rights will likely be irreparably compromised as soon as that seed is multiplied by growing the next crop.

The policy decision by Congress in section 2543 to allow farmers to sell their saved seed if planting plans change should not be construed so that farmers may sabotage the owner's market for the protected seed by failing to give the statutory notice on such sales. Moreover, requiring notice on all seed sales under section 2543 eases an owner's already-difficult task of protecting its investment and policing its market. If an owner learns that its PVPA seed is being sold without notice, the owner should have the option of bringing an enforcement action on that basis alone, whether the seller's sales are otherwise within section 2543 or not.²⁸ Thus, the policies for giving notice to the public remain best served by requiring such notice whenever PVPA-protected seed is dispensed, which is why Congress did not exempt the requirements of section 2541(6) from applying to any seed sales made under section 2543.

The policies supporting providing notice to all recipients of a PVPA-protected seed remain constant, regardless of the type of transaction involved. Moreover, requiring notice on all seed sales, whether "brown bag" seed sales or not, is consistent with Congress' intent in 7 U.S.C. § 2567 that a purchaser or user of protected seed be given actual notice of prohibited acts before being subject to remedies for infringement. Thus, regardless of how the quantitative limitation governing sales of "such saved seed" in section 2543 is interpreted by this Court, this

²⁸ Without notice being required on all seed sales under section 2543, certificate owners will surely be unable to enforce their remaining rights under the Act with respect to any seed grown from the "unmarked" brown bag seed. If a selling farmer is not liable for selling without proper notice and is the only source of proof that the purchasing farmer received actual notice, the practical difficulties of a certificate owner obtaining suitable testimony from the selling farmer in a suit against the purchaser will be enormous.

Court should hold that the notice requirement of section 2541(6) applies to all sales of PVPA-protected seed, even to the extent that such sales are properly made under the provisions in the first sentence of section 2543.

III. THE PURPOSES AND POLICIES UNDERLYING THE PVPA CAN ONLY BE PRESERVED BY RESTORING CONGRESS' INTERPRETATION ON BOTH STATUTORY ISSUES PRESENTED

The proper resolution of both statutory interpretation issues presented is equally and vitally important to the future of the PVPA and the private plant breeding industry in the United States. A PVPA certificate owner has distinct interests in enforcing the limits on the amount of its PVPA-protected seed that can be sold under section 2543 and in ensuring that all of its PVPA seed is dispensed to the public with proper notice of its protected status. As to the former, each bushel of seed sold by another under section 2543 represents one less bushel on which the owner is able to recoup his investment costs through profit or royalties. As to the latter, each bushel sold without notice creates a potentially unlimited source of unauthorized seed sales insulated from recovery by the terms of section 2567.

By itself, restoring the statutory limit set by Congress on the quantity of PVPA-protected seed that can be sold under section 2543 to the amount needed to produce another crop on the seller's farm will not cure the disastrous effects of the Federal Circuit's current view of section 2543. Indeed, the Federal Circuit's failure to uphold Congress' requirement for notice on all transactions involving PVPA-protected varieties in a form which can be propagated will eliminate the incentives and protection of the PVPA just as surely (and nearly as quickly) as would the Federal Circuit's determination that up to half of a farmer's crop can be sold as seed under section 2543.

When the PVPA was enacted in 1970, the House Committee on Agriculture listed the benefits that were ex-

pected to accrue in the United States as a direct result of providing legal protection for plant varieties:

1. It will greatly stimulate plant breeding.
2. It will allow our Government agricultural experiment stations to increase their efforts on needed basic research.
3. It would permit public expenditures for applied plant breeding to be deviated to important areas which industry may not pursue.
4. It will give farmers and gardeners more choice, and varieties which are better in yield or in quality, and so forth.
5. It will make American agricultural products more competitive in world markets.
6. Consumers and other purchasers of crops will benefit; in some instances by improved quality, in others by aiding the production needed to serve them.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 2-3 (1970). If left intact by this Court, the Federal Circuit's erroneous interpretation of section 2543 will ensure that the policies supporting enactment of the PVPA will be frustrated and the benefits afforded by the statute to the American farmer will be eroded.

As recognized by Judge Newman, "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. 30a. Even before the Federal Circuit's crippling ruling, major seed companies such as Pioneer Hi-Bred International, Inc., Agripro Biosciences Inc., and Northrup King Co. were among those that had abandoned existing and reduced future variety research programs due to unfair price competition from illegal "brown bag" seed

sales of their own PVPA seed.²⁹ If left intact, the Federal Circuit's decision will cause a bad situation to become much worse.

The significant costs of plant breeding research must ultimately be justified through recouping that investment from sustained sales of the new varietal seeds which reach the market. The plant breeding industry cannot continue its research and development expenditures unless the results of its efforts are adequately protected from infringement. If the Federal Circuit's interpretation of section 2543 is accurate, seed companies have wasted an enormous amount of time and money over the past twenty years in developing novel plant varieties that they never had any legitimate chance of being able to protect. Having enacted the PVPA to encourage private industry to dedicate the necessary resources to breed new and improved plants, Congress clearly did not intend such a result.

Legislation was recently introduced to amend the PVPA "to make such Act consistent with the International Convention for the Protection of New Varieties of Plants of March 19, 1991, to which the United States is a signatory, and for other purposes."³⁰ S. Rep. No. 1406, 103d Cong., 2d Sess. (1994); *see also* H.R. Rep. No. 2927, 103d Cong., 1st Sess. (1993). The current versions provide that "[t]he first sentence of section 113 (7 U.S.C. § 2543) is amended by striking 'section: *Provided, That*' and all that follows through the period and inserting 'sec-

²⁹ For more detailed accounts of the scope and effects of illegal brown bag seed sales on the seed industry's past and future research efforts, see the Brief Amicus Curiae Of The American Seed Trade Association In Support Of Petitioner.

³⁰ The International Convention for the Protection of New Varieties of Plants, Mar. 19, 1991 is known by the French acronym "UPOV." Article 14(1) of the 1991 UPOV requires that there be authorization of the owner before the seed of a protected plant variety may be offered for sale. In addition, the proposed legislation amends or alters numerous other aspects of the PVPA not at issue before this Court.

tion.'" S. Rep. No. 1406, 103d Cong., 2d Sess. § 11 (1994); H.R. Rep. No. 2927, 103d Cong., 1st Sess. § 9 (1994). By striking that proviso from section 2543, the proposed bills would eliminate the statutory basis under which farmers can sell PVPA-protected seed to other farmers for reproductive purposes without authority from the certificate owner.³¹

The proposed amendments to the PVPA do not affect any existing PVPA certificates, such as the two Asgrow varieties at issue here. Section 15 of S. Rep. No. 1406 states:

Except as provided in this section, any variety for which a certificate of plant variety protection has been issued prior to the effective date of this Act, and any variety for which an application is pending on the effective date of this Act, shall continue to be governed by the Plant Variety Protection Act, (7 U.S.C. § 2321 et seq.), as in effect on the day before the effective date of this Act.

In addition, the proposed legislation provides that "[t]his Act and the amendments made by this Act shall become effective 180 days after the enactment of this Act." S. Rep. No. 1406, § 16. Thus, because the pending legislation is prospective only, it would not render the present case moot or insignificant. *See* U.S. Petition Brief, at 18 ("even if the bills are enacted in their present form, further review of the decision below would be warranted").

If the proposed bills are enacted into law, in practical effect Congress will have created *two* applicable versions of the PVPA, at least until the expiration of all PVPA certificates that are pending or issued as of 180 days after

³¹ After being amended in several respects not related to section 2543 since the briefing on the petition for certiorari in this case, S. 1406 was passed by the Senate on May 25, 1994. As of the filing of this brief, H.R. Rep. No. 2927 has not been amended or approved by the House.

the enactment of the proposed legislation. It is estimated that there are approximately 3500 issued PVPA certificates that would remain subject to the present Act and the interpretation of section 2543 at issue here.³² Those issued certificates include the leading soybean, cotton, wheat, and other PVPA-protected varieties currently being marketed and planted throughout the country. Thus, the legal issues presented by this case would remain of critical importance to American agriculture and the private seed breeding industry. See U.S. Petition Brief, at 19 ("decision below will have a continuing adverse impact on the breeders of novel varieties for years to come").

If the Federal Circuit's decision in this case remains controlling even just as to all issued PVPA certificates, many existing seed breeders may not be able to support or sustain their on-going research efforts long enough to benefit from the new amendments. The new varieties being introduced today are those for which the research was begun in the early 1980's. Similarly, any new varieties introduced over the next decade will be the result of the research programs of today. However, many of those on-going research programs are being severely curtailed or eliminated outright due to the inability of the PVPA to protect the investments necessary to support those programs. Thus, the benefits for farmers, breeders, and consumers from the PVPA can only be preserved by reversing the Federal Circuit's decision in this case, whether the proposed legislation is enacted or not.

Moreover, it will not necessarily be the seed companies that will be harmed the most by the Federal Circuit's

³² In the first ten years of the PVPA, 798 plant variety protection certificates were issued. Chisum, § 1.05[2], at 1-274. By 1982, the number had risen to 174 certificates issued in a single year. *Id.* In 1993, 272 new plant variety protection certificates were issued. See J. Kraus, *Case Control in the Plant Variety Protection Act: Eradicating Asgrow*, 76 J. Pat. & Trademark Off. Soc'y 291, 291 & nn.3-4 (April 1994).

evisceration of the PVPA. Some seed companies may be able to redirect their research funds to hybrids and to asexually-reproduced plants protected by the Plant Patent Act. Some seed companies will be able to transfer their research and development efforts for new varieties to foreign countries which have greater and more enforceable legal protection for sexually-reproduced plants.³³ As research in novel varieties is shifted to other countries, it will be the American farmers who will be unable to compete effectively in the international agricultural market as foreign yields increase as a result of new and improved varieties not available in this country.

Congress understood that one form of protection (limiting unauthorized sales of PVPA seed) in the absence of the other (requiring notice on all transfers of PVPA seed) would not further the important purposes underlying the PVPA; however, the Federal Circuit plainly did not. The construction of section 2543 devised by the Federal Circuit allows up to half of a person's crop in a protected novel variety to be sold as seed and then exempts this immense quantity of seed sales from the notice requirements of section 2541(6). That illogical combination was never intended by Congress, defies the purposes of the PVPA, and is contrary to the explicit language of the Act.

If up to half (50%) of each crop of a protected variety produced on a farm can be sold as seed, a requirement that there be notice on all such sales will not overcome the crippling effects of the erroneous quantitative ruling. Similarly, if permissible seed sales under section 2543 are properly limited to the amount of seed needed to produce another crop on the farm, a failure to require that notice be given on such sales will likely place equally huge amounts of novel variety seed beyond the effective

³³ In countries adhering to UPOV provisions, there is no right to sell any quantity of protected seed without the authority of the owner. See UPOV, Art. 14(1).

enforcement reach of the certificate owner. Thus, if either aspect of the Federal Circuit's interpretation of section 2543 is left unaltered by this Court, the result will truly be "a travesty of statutory construction" (Pet. App. 32a) with immense negative consequences for American agriculture, farmers, and consumers.

CONCLUSION

For the reasons stated above, the judgment of the Federal Circuit should be reversed in its entirety and the case remanded for further proceedings in accordance with the statute properly restored by this Court to the interpretation intended and enacted by Congress.

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APPENDIX

APPENDIX**7 U.S.C. § 2541. Infringement of plant variety protection**

Except as otherwise provided in this subchapter, it shall be an infringement of the rights of the owner of a novel variety to perform without authority, any of the following acts in the United States, or in commerce which can be regulated by Congress or affecting such commerce, prior to expiration of the right to plant variety protection but after either the issue of the certificate or the distribution of a novel plant variety with the notice under section 2567 of this title:

- (1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or possession of it;
- (2) import the novel variety into, or export it from, the United States;
- (3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or
- (4) use the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom; or
- (5) use seed which had been marked "Unauthorized Propagation Prohibited" or "Unauthorized Seed Multiplication Prohibited" or progeny thereof to propagate the novel variety; or
- (6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received; or
- (7) perform any of the foregoing acts even in instances in which the novel variety is multiplied other than sexually, except in pursuance of a valid United States plant patent; or
- (8) instigate or actively induce performance of any of the foregoing acts.

7 U.S.C. § 2543. Right to save seed; crop exemption

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.

7 U.S.C. § 2567. Limitation of damages: marking and notice

Owners may give notice to the public by physically associating with or affixing to the container of seed of a novel variety or by fixing to the novel variety, a label containing either the words "Unauthorized Propagation Prohibited" or the words "Unauthorized Seed Multiplication Prohibited" and after the certificate issues, such additional words as "U.S. Protected Variety". In the event the novel variety is distributed by authorization of the owner and is received by the infringer without such marking, no damages shall be recovered against such infringer by the owner in any action for infringement, unless the infringer has actual notice or knowledge that propagation is prohibited or that the variety is a protected variety, in which event damages may be recovered only for infringement occurring after such notice. As to both damages and injunction, a court shall have discretion to be lenient as to disposal of materials acquired in good faith by acts prior to such notice.